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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Phyllis J. Hamilton, Judge

"AMY, " ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
VS.	)	NO. CV 19-2184-PJH
	)	
RANDALL STEVEN CURTIS,	)	
	)	
Defendant.	)	
	)	

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Oakland, California  
Thursday, March 25, 2021

TRANSCRIPT OF PROCEEDINGS HELD VIA ZOOM WEBINAR

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1      Thursday - March 25, 2021

1:10 p.m.

2      P R O C E E D I N G S

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4      **THE CLERK:** Calling CV 19-2184, "Amy," et al. vs.  
5      Curtis.6      Counsel, please identify yourselves, starting with  
7      plaintiffs' counsel.8      **MS. HEPBURN:** Carol Hepburn here for plaintiffs.9      **MR. KAWAI:** John Kawai for plaintiffs.10     **MS. BIANCO:** And Deborah Bianco for plaintiffs.11     **MS. MABIE:** And Margaret Mabie be for plaintiffs.12     **THE COURT:** All right. Good afternoon.13     **MR. BALOGH:** Good afternoon, Your Honor. Ethan Balogh  
14     for the defendant.15     **THE COURT:** Good afternoon.16     Okay. Thank you all for making yourselves available on  
17     such short notice, but I needed to have further discussions  
18     based upon the more recent filings that you all have made.19     The supplemental chart that plaintiffs submitted as well  
20     as the set of objections that Mr. Balogh has filed have been  
21     very helpful in elucidating for me exactly what you guys are  
22     doing. I am having a hard time understanding how you all  
23     believe the case should be litigated, and I -- and the chart  
24     and the objections did help me to focus in on what we need to  
25     focus in on now, which are the details. All right?

1           We've had lots of motions over the last year on lots of  
2 different things. A lot of things have been disposed of, and I  
3 don't want to hear more argument on things that I've already  
4 decided. There's a motion pending before me now that still  
5 needs to be decided, and I need more help than I have been  
6 given in understanding your positions and trying to figure out  
7 what the right thing to do is.

8           Your filings, while helpful, have raised many more  
9 questions. I have four pages of questions that I have for you  
10 all today as I'm trying to understand what you all are  
11 attempting to do, both in this motion and if the case goes  
12 further.

13           Now, as I've said before, this case suffers from having no  
14 identified legal standard. It's very rare that there is a  
15 civil case that's prosecuted in our court for which there --  
16 the parties are simply working from the statute itself. There  
17 are generally elements that have been determined by the  
18 appellate courts for each cause of action that are easy to  
19 identify, and the dispute is whether or not the evidence meets  
20 those elements, but here we don't have that.

21           But given all the other rulings that I've made and  
22 particularly eliminating the damages, what's left in this case  
23 when we look at the statute is proof that the victims were  
24 indeed victims of this particular defendant's crime.

25           Now, I indicated in one of the orders entered after our

1 last hearing what I have determined to be the three elements  
2 that need to be established in order to prove that part of the  
3 case, and that's what this motion is supposed to be about and  
4 it's clearly what any trial would be about. And those elements  
5 I set forth are the identification of the plaintiffs in a  
6 particular image or images; two, that are pornographic in  
7 nature, and that is as defined in 18 U.S.C. Section 2256. It's  
8 not at all clear to me that people are hewing to that  
9 definition. And that those images were in possession by the  
10 defendant, in other words, if they resided on his computer.

11 Those are the three things that need to be proven. I  
12 would like -- I have lots of questions on the second and third  
13 element, and that's what we are going to spend our time on this  
14 afternoon, but I have a couple -- I have some preliminary  
15 questions before we get to element number 2, which is where we  
16 are going to start.

17 Defense counsel says in his supplemental brief that he was  
18 never served with a copy of Docket No. 139.4. I don't really  
19 understand what that means.

20 Mr. Balogh, that docket number is on the website. It's on  
21 PACER. It's in the ECF system. And I'm not sure what you mean  
22 because when I pull it up -- when I look at the docket, I see  
23 139.4 -- dash 4, which is the unredacted -- I forget what it  
24 is -- declaration of something or another, and it's available  
25 to me. Are you saying that it is not available to you? You

1 cannot pull that up?

2                   **MR. BALOGH:** Yes. It's a sealed document, but I'll  
3 withdraw that objection. The copy that Mr. Kawai gave me after  
4 I complained had more pages than the redacted copy, which is  
5 why I objected to that, which is I don't have the carbon copy  
6 because one is different than the other.

7                   I've gone through and done a page-by-page comparison, and  
8 I see where the supplemental copy that Mr. Kawai provided me  
9 has extra pages in it, but they're not truly extra pages. What  
10 happened was when he scanned it or whoever scanned it,  
11 sometimes the scan creates a copy of the back of a page because  
12 the scan is just reading whether there is text on it and it's  
13 not differentiating between intentional text and text that has  
14 bled through the back, and after I made those comparisons page  
15 by page, I have been able to confirm that I do -- while it's  
16 not 139.4 per se, I do have a complete set. I withdraw that  
17 objection.

18                   **THE COURT:** Okay. Thank you. That takes care of  
19 that.

20                   I'm talking to the lawyers on both sides. Have any of you  
21 had any prior trial experience with this particular code  
22 section, 2255? There is a dearth of any case law on this  
23 particular section given these civil remedies to victims of  
24 these various different offenses, so I want to know, have any  
25 of you ever had a trial involving 18 U.S.C. Section 2255?

1                   **MS. HEPBURN:** I have not.

2                   Margaret, has your firm had one?

3                   **MS. MABIE:** I don't believe we have, no.

4                   **THE COURT:** Okay.

5                   Mr. Balogh, have you ever tried one of these?

6                   **MR. BALOGH:** Oh, I have not, but I would note -- and I  
7 think the record should be clear -- plaintiffs have brought  
8 double digit cases like this.

9                   **THE COURT:** Okay. Okay. But litigating the case is a  
10 little bit different than trying it.

11                  How about criminal trials? Mr. Balogh, you're a criminal  
12 lawyer. Have you tried 2252 cases?

13                  **MR. BALOGH:** No. Never.

14                  **THE COURT:** Okay. Those are just the straight child  
15 porn cases like Mr. Curtis went through. I know Shawn Halbert  
16 represented him in the trial court proceedings.

17                  **MR. BALOGH:** My familiarity with the statute is  
18 solely -- I have done a bunch of these cases to the Court of  
19 Appeals, but I have never tried any sort of 2241, 2255, the  
20 typical 1591. I have had appeals on all of those types of  
21 cases, but I have never actually tried one in the district  
22 court.

23                  **THE COURT:** Have you represented people charged with  
24 2252 in the district court? That's the possession of child  
25 porn.

1                   **MR. BALOGH:** I'm trying to think.

2               Yeah. I had one case, but it was on remand after a  
3               successful appeal, and we resolved it, but I haven't tried it.  
4               I have never tried a child -- any sort of sexual abuse case  
5               involving minors. I have only had appellate experience.

6                   **THE COURT:** Okay. All right. So we're sort of the  
7               blind leading the blind here.

8               All right. So another question, is there any dispute  
9               among you all that the preponderance of the evidence is the  
10               appropriate standard for the three elements that I have  
11               assessed are at issue in this case? Is there anyone aware of  
12               authority requiring clear and convincing evidence?

13                   **MR. BALOGH:** There is case law which would suggest  
14               clear and convincing evidence. Originally civil fraud was  
15               always on that standard. There is, I think, an 1896 Supreme  
16               Court case which suggests that a case involving fraud or -- has  
17               that standard, and there is an argument to be made that it  
18               could be applied here, but I have never seen a case that would  
19               apply to this particular statute, and we are proceeding under  
20               the standard of it's a civil case, preponderance is the normal  
21               standard.

22                   **THE COURT:** Yes. This isn't a fraud case. So --

23                   **MS. HEPBURN:** Plaintiffs have no understanding of any  
24               such authority for anything other than preponderance standard,  
25               Your Honor.

1                   **THE COURT:** Okay. That's my view as well.

2                   Is there any dispute -- now, I have set these three  
3 elements; right? You all know what they are now. The chart  
4 and the objections deal with those three elements.

5                   Is there any dispute that if the Court is unable to grant  
6 summary judgment on any one of the elements for any one  
7 individual plaintiff, that a trial would be warranted?

8                   **MR. BALOGH:** I'm not understanding the question,  
9 Your Honor. I think -- my understanding is trial is default,  
10 and a party can avoid a trial to the extent they present  
11 concrete evidence that establishes they win as a matter of law,  
12 and in the absence of that party sustaining their burden, trial  
13 is the default mechanism to resolve a claim brought by a  
14 plaintiff in a federal court.

15                  **THE COURT:** That's not really my question. The  
16 typical summary judgment standard applies. Plaintiffs have to  
17 bring forth the evidence to prove their case. The defendant  
18 has to -- I'm sorry. In this case, the plaintiff is actually  
19 the moving party. It's usually the other way around, but the  
20 plaintiff has to establish their case, and the defendant has to  
21 bring forward evidence that raises a triable issue,  
22 notwithstanding the evidence raised by plaintiff. That is the  
23 summary judgment standard here.

24                  My question, though, is there are three elements for this  
25 offense, and each plaintiff has to meet each of those three

1 elements. If a plaintiff does not meet each of the three but  
2 only meets two of the three, is there any doubt -- is there any  
3 dispute that a trial would be necessary if there's one missing  
4 element that has not been proven on summary judgment?

5 **MR. BALOGH:** I think --

6 **MR. KAWAI:** As to that -- I'm sorry. As to that  
7 plaintiff, Your Honor?

8 **THE COURT:** Pardon me?

9 **MR. KAWAI:** I'm sorry. On a plaintiff-per-plaintiff  
10 basis?

11 **THE COURT:** On a per plaintiff basis.

12 **MS. HEPBURN:** Your Honor, plaintiffs would assert that  
13 Your Honor can find any of the three elements for each  
14 plaintiff on this motion, and, yes, if you find for, instance,  
15 for Amy, that she has established sexual content and connection  
16 to or that it was the -- the image was possessed by Defendant  
17 Curtis but she hasn't established, for instance, identity, then  
18 we would acknowledge that she should go forward to trial on the  
19 issue of identity, but we do believe the Court has the power to  
20 find and dispense with any elements that you find the proof is  
21 sufficient on on this motion.

22 **THE COURT:** Well, of course. I mean, the Court can  
23 adjudicate any of the issues and elements, but my question was  
24 if there was any dispute whatsoever that if the Court cannot  
25 adjudicate each of the three elements for each of the

1 individual plaintiffs, that a trial would be had?

2           **MS. HEPBURN:** Yes.

3           **MR. BALOGH:** I think trial would be had. I also think  
4 that the plaintiffs did not move for summary adjudication.

5 They've waived that. And I think under *Sineneng-Smith*, you  
6 can't give relief they haven't sought, and they made their  
7 motion. They didn't seek that. They had the opportunity to  
8 make such a motion. They didn't seek it. We didn't brief it.  
9 And they went for everything. If they come up short of one  
10 element, I think we get a trial on all elements as that's the  
11 state of the case. They can't get more relief than they  
12 sought, and they didn't seek that in any of their briefing to  
13 date.

14           **THE COURT:** That's not generally how I proceed, but  
15 what's your response? What's the plaintiffs' response?

16           **MS. HEPBURN:** As the Court said, we believe the Court  
17 can adjudicate any of the issues before it for which it finds  
18 there is sufficient evidence and to streamline the process for  
19 trial.

20           **THE COURT:** Okay.

21           **MR. KAWAI:** I believe that if the Court does not grant  
22 all the relief requested by the motion, it can still enter an  
23 order stating that any material fact not genuinely in dispute  
24 and treat it as established in the case under Rule 56.

25           **THE COURT:** That's what civil lawyers are always

1 asking me to do.

2 **MR. KAWAI:** Yes.

3 **THE COURT:** Okay. Thank you. That helps.

4 Is there any dispute that the trial would be before a jury  
5 unless both sides consent?

6 **MR. BALOGH:** No dispute.

7 **MS. HEPBURN:** No dispute.

8 **THE COURT:** No dispute?

9 **MR. KAWAI:** Correct.

10 **THE COURT:** Okay. Great. Those are all my  
11 preliminary questions.

12 Now, let's talk about the elements. The element that is  
13 giving me the most concern is the content. Now, Section 2252,  
14 the section under which Mr. Curtis was convicted, criminalizes  
15 the possession of material if the material includes the visual  
16 depiction of a minor engaging in sexually explicit conduct.  
17 That's what 2252 criminalizes. Section 2256 defines what  
18 "sexually explicit conduct" is.

19 Which sections of 2256 -- I've had occasion to look at it  
20 very, very closely. Which sections of 2256 do the plaintiffs  
21 rely on? And it could be different for each image. But I  
22 don't see the use of 2256 throughout the briefing in this case,  
23 so I'm not exactly sure what the position of the plaintiffs are  
24 with respect to how they meet those definitions.

25 The Court -- or if a jury is trying it or if the Court is

1       trying it -- isn't going to just look at an image and determine  
2       this is or is not child pornography. It's going to have to be  
3       compared to the definition of "child pornography."

4           So what are plaintiffs proceeding under?

5           **MS. HEPBURN:** I think it's different for each image,  
6       Your Honor, and we would need to go through. I mean, I know  
7       off the top of my head, lascivious exhibition of the genitals  
8       refers to the image of Mya, for example. There are other  
9       certain images that show sexual intercourse. There are images  
10      that show masturbation, and there are those that show the  
11      connection or the content -- excuse me -- contact between oral  
12      and genital or anal and genital of the offender or -- excuse  
13      me -- of the perpetrator or the adult in the image and the  
14      child. I think we just have to look at each individual image,  
15      and, again, we're a little bit hamstrung with the contraband  
16      nature of it, but, you know --

17           **THE COURT:** Where am I supposed to find that? I've  
18      got this motion pending before me, and you want me to determine  
19      that the images -- and we'll talk about how that is supposed to  
20      happen, but ultimately on this motion, the Court would have to  
21      determine that that element of the pornographic nature has been  
22      met, and I have no idea. Laws doesn't say in his declaration  
23      which section the particular image fulfills. Who decides that?

24           And another thing, I'm actually struggling a little bit  
25      with 2256. Maybe you all who have more experience with it can

1 elucidate. There are two provisions that you've just --  
2 three -- you have just mentioned three. There are five ways in  
3 which one can show sexually explicit conduct. Five ways. One  
4 is the sexual intercourse, including various different genital  
5 to genital or oral/genital, anal/genital, etc., of any two  
6 people -- between persons of the same or opposite sex. One is  
7 bestiality, one is masturbation, one is sadistic or masochistic  
8 abuse, and one is the lascivious exhibition of the anus,  
9 genitals, or pubic area of any person.

10 Now, how do you all interpret that last one? What is the  
11 lascivious exhibition of the genitals of any person? It  
12 doesn't say minor. So would the exhibition of the adult male  
13 member with the minor -- would that count as a lascivious  
14 exhibition of the pubic area of any person?

15 You see my point. There isn't anything in the record that  
16 goes with this kind of specificity. Frankly, I don't really  
17 know what you guys are attempting to do here. I mean, how do  
18 you find -- how does any fact-finder find that this definition  
19 is met, which you have to meet in order to establish liability  
20 without answering those questions, knowing which section  
21 applies and why.

22 Okay. So the only answer I received so far is there  
23 are -- various different sections within 2256 apply, depending  
24 upon the image.

25 **MS. HEPBURN:** If I can add to that, Your Honor, and

1       picking up on the example that you just gave of whether -- the  
2       question of whether the display of adult genitalia does  
3       satisfy, I would think that looking at the display of genitalia  
4       and the context in which it occurs with, for example, the  
5       display of an adult erect penis in close proximity to, A, the  
6       genitals of a child, B, the mouth of a child, C, with the  
7       evidence of ejaculate in the picture, looking at what may be  
8       the context -- surrounding context, that is, is it a bedroom,  
9       how is the child dressed, all of those kinds of things go into  
10      making up whether or not this is lascivious, i.e., focused upon  
11      sex.

12           **MS. MABIE:** I would just like to add, Your Honor,  
13       there is a case that -- *U.S. vs. Dost*, 636 828 Southern  
14       District of California, 1986, which does have a six-factor  
15       analysis for how you would determine whether or not an image is  
16       lascivious.

17           **THE COURT:** What was that citation again?

18           **MS. MABIE:** It's *United States vs. Dost*, 636 Federal  
19       Supplemental 828, Southern District of California, 1986.

20           **THE COURT:** 636 Fed Supp --

21           **MS. MABIE:** 828 SD Cal 1986. "Dost" is spelled  
22       D-O-S-T.

23           **THE COURT:** Okay. 636 Fed Supp, page?

24           **MS. MABIE:** 828, Your Honor. I apologize. I was on  
25       mute.

1                   **THE COURT:** Okay. Thank you.

2                   All right. Now, that leads -- Mr. Balogh, do you have  
3 anything to say about that?

4                   **MR. BALOGH:** I think we briefed *Dost*. I think both  
5 parties did. I think it's -- I think those factors aren't  
6 obviously binding to the district court case, but I think that,  
7 you know, in this case at this stage, the plaintiffs had the  
8 opportunity to depose Popper, to prepare this evidence and  
9 bring it forth, and Mr. Laws had the opportunity to view what  
10 he believes was the media, was representative of the media, and  
11 he didn't provide it, and so I think there is just a failure of  
12 proof at this stage, and that's where we land, which is they  
13 didn't bring forth the evidence that they needed to sustain  
14 their burden.

15                  **THE COURT:** Next question: Who decides if an image  
16 qualifies as child pornography within the meaning of 2256?

17                  **MR. BALOGH:** The jury would.

18                  **THE COURT:** Hold on. In two instances. Who decides  
19 on this motion and at trial, if the matter proceeded to trial?

20                  I'd like your thoughts on that with regard to both.

21                  Mr. Balogh?

22                  **MR. BALOGH:** I think it's a fact-finder question in  
23 both cases because it's an element of the offense which gets  
24 decided by the fact-finder. At the summary judgment stage, the  
25 Court determines whether there is evidence before it that the

1 evidence is such in dispute it can make a finding without  
2 offending someone's trial rights because there is no dispute of  
3 material fact.

4 And this case I think is -- as I've just sort of alluded  
5 to, it's more of a failure to prove. It's not that they've  
6 come forward -- I think for one picture, the Sally question,  
7 for example, there is a photograph of Sally. They claim it's  
8 of Sally. She is in a shower. She is standing up smiling sort  
9 of as I am in this image to you. And it's just -- and it's  
10 redacted below the collar bone, but I will assume for the  
11 purpose of discussion that she's naked in the photograph.  
12 That -- we would contend, for example, like that that even if  
13 they could show it's Sally and even if they could show that  
14 image was possessed by Mr. Curtis, which I don't believe  
15 they've done, that that picture on its face is not -- doesn't  
16 meet the definition because -- even under the *Dost* factors  
17 because it's just a picture of a naked child. There is no lewd  
18 and -- there is no lascivious display of the genitals. There  
19 is no intercourse. There is no bestiality. There is no  
20 masturbation. There is none of the things in the statutory  
21 definition. And if the plaintiffs wanted to claim, *Well,*  
22 *Mr. Balogh, you are incorrect* and they wanted to have a  
23 contrary argument, the Court would have to decide that, whether  
24 it believed it met the definition, and I think the Court at  
25 summary judgment would have the photograph in front of it and

1 could.

2         But this is a failure-of-proof defense mostly because  
3 they've not shown that it was on Mr. Curtis's computer, and  
4 they haven't --

5         **THE COURT:** Hold on. I don't want you to get into all  
6 that. I have dozens of questions. Let's do one thing at a  
7 time.

8         **MR. BALOGH:** All right.

9         **THE COURT:** My question now is specifically who  
10 decides on summary judgment and at trial if an image --  
11 assuming there is a dispute between plaintiffs and defendant as  
12 to whether or not an image is or is not pornographic, who  
13 decides that?

14         **MR. BALOGH:** It's a question of fact unless the Court  
15 determines it can decide it as a matter of law, something as a  
16 matter of law, that it's within the Court's purview. In the  
17 absence of finding something as a matter of law, it's for the  
18 fact-finder; may not be decided by the Court at summary  
19 judgment.

20         **THE COURT:** Okay. Now, I have conducted an in camera  
21 review of the unsanitized images on that -- that appear on the  
22 chart, so that means there is just 15 of them.

23         **MR. BALOGH:** We've noted our objection to that because  
24 how do we know that that's what you viewed?

25         **THE COURT:** Well, you don't know except that that's

1 what I'm telling you I viewed --

2                   **MR. BALOGH:** And that's my respectful objection.

3 That's like star chamber stuff. I'm not present. I don't --

4                   **THE COURT:** Well, regardless of how you wish to  
5 characterize it, Mr. Balogh, I have conducted an in camera  
6 review because I made the assumption that all of you have seen  
7 the images and I'm the only person who didn't see it and I have  
8 no idea what you're even talking about. But now that I've read  
9 the papers, it doesn't seem to me that you all have seen the  
10 images.

11                   **MR. BALOGH:** That's correct.

12                   **THE COURT:** Am I correct about that, that you have not  
13 seen the images?

14                   **MR. BALOGH:** I saw images from his hard drive,  
15 unrelated necessarily to any of these plaintiffs, something  
16 like two-and-a-half, three -- actually three years ago. So  
17 since this case has been brought, have I reviewed any specific  
18 images that plaintiffs claim apply to them? No. Plaintiffs  
19 sought no discovery. They didn't bring it forth. I have zero  
20 idea and can't confirm or deny any of these images --

21                   **THE COURT:** Mr. Balogh, please, just quit all of the  
22 commentary. Okay? We are going to get to that. I'm just  
23 trying to get through my questions one at a time.

24                   Have plaintiffs' counsel seen the unsanitized images?

25                   **MS. HEPBURN:** Not all of them.

1                   **THE COURT:** Have you seen some of them?

2                   **MS. HEPBURN:** I have seen some of them. I don't think  
3 my colleagues have.

4                   **THE COURT:** Well, how do you know which images qualify  
5 as child pornography if you haven't seen them?

6                   **MS. HEPBURN:** Looking at the sanitized images and  
7 relying upon the descriptions by the POCs, the law enforcement  
8 points of contact who have seen them and their descriptions.

9                   **THE COURT:** How did you select the images that are on  
10 your chart?

11                  First of all -- I'm getting beyond myself. I didn't get  
12 an answer for my question about who decides the motion, at --  
13 who decides if the photos qualify as child pornography on the  
14 motion and at trial.

15                  Mr. Balogh, you didn't give me an answer to the second  
16 part.

17                  **MR. BALOGH:** Oh, I thought I did. It's a fact-finder  
18 question always. This Court can only make a determination at  
19 this point if it qualifies as a matter of law. In the absence  
20 of such a finding that the image qualifies as a matter of law,  
21 it's a fact question for the jury that may not be decided at  
22 summary judgment.

23                  **THE COURT:** Okay. I could probably decide as a matter  
24 of law.

25                  And at jury trial, if there is a jury trial, does the jury

1 see the images and make a decision or does the jury just listen  
2 to what other people say about it and make a decision based  
3 upon other people's characterizations?

4 **MR. BALOGH:** The jury sees the image and makes a  
5 determination.

6 **THE COURT:** The unredacted, unsanitized images?

7 **MR. BALOGH:** Yes.

8 **THE COURT:** Okay.

9 Ms. Hepburn?

10 **MS. HEPBURN:** I'm in agreement with that, Your Honor.  
11 I do believe that you can decide this on summary judgment,  
12 whether the images that you've seen constitute child  
13 pornography under the statutory definition, and if not, then,  
14 yes, it's a jury question, and, yes, the jury should see the  
15 unsanitized images.

16 **THE COURT:** Okay.

17 How did you select the images for the chart?

18 **MS. HEPBURN:** Well, in a couple of cases, there was  
19 only a single image of a plaintiff so those were easy. We  
20 attempted to select ones for which there was not a large  
21 question about whether it was a pornographic image given the  
22 descriptions that we had. Those were the major guiding  
23 principles, you know, ones where we had a clear ID from either  
24 the parent or the plaintiff.

25 We tried to put together those three elements that the

1 Court had and find those images that most clearly fit that --  
2 each element.

3 **THE COURT:** Okay. Now, my next question was -- I'm  
4 not exactly sure what your intent is. Are plaintiffs relying  
5 upon Mr. Laws, who is your designated 3509 expert, to make the  
6 determination about which images are pornographic and which  
7 ones aren't? And if that's the case, what about the images  
8 that Laws doesn't address? There are images on your chart that  
9 he doesn't address at all.

10 **MS. HEPBURN:** We do not rely on him to make that  
11 determination, Your Honor. And he -- his process was one where  
12 he did not ask Agent Popper to just "pull out the images of  
13 plaintiffs and show me where they are." Mr. Laws felt it most  
14 important for him to have the media as a whole and take it  
15 through his forensic software and define the images, if he  
16 could.

17 He could not find all of the images for each of the  
18 plaintiffs on this, and we submit that that also goes to  
19 bolster his credibility because he wasn't just a rubber stamp  
20 for plaintiffs' assertions in the case.

21 And so for those ones which Mr. Laws did not find and so  
22 we don't have his declaration about that, that's where we rely  
23 on the POCs and we rely on the sanitized images and we rely on  
24 the declarations of those plaintiffs or their parents that were  
25 able to identify them from the sanitized images.

1                   **THE COURT:** Okay. But we're talking about two  
2 different identifications. One is the identification of the  
3 girls as being the person depicted. The other is  
4 identification of the image as being pornographic within the  
5 definition of 2256. You've got -- you're kind of all over the  
6 place on it.

7                   I did a quick summary this morning, and you've got -- on  
8 your chart, you've got Laws as the person identifying the  
9 content as pornographic for five of the fifteen plaintiffs.  
10 Then you've got the Court's in camera review for three of the  
11 plaintiffs. You've got -- four plaintiffs appear to identify  
12 the pornographic nature of the image themselves in four of  
13 them. Two of them are in conjunction with one or more POCs,  
14 and one is in conjunction with the Court when you don't really  
15 know what my construction is so I don't even know how you can  
16 rely upon me having come to the conclusion that they're all  
17 pornographic images. And then you've got two identified by  
18 POCs alone. And then you've got one on your chart that isn't  
19 identified by anybody at all. So to the extent that the chart  
20 was intended to be helpful, it's just caused me more confusion.  
21 Take a look. Take a look at the chart that you gave me.

22                   How is it that Amy, for instance, who you on the chart say  
23 identifies the pornographic nature -- how is it that she is  
24 able to identify if something fits within the definition of  
25 2256?

1                   **MS. HEPBURN:** She testified in her declaration,  
2 Your Honor, that her abuser would put her on the sheets, which  
3 are shown in the sanitized images; that he would have her pose  
4 in such a way to show her vaginal area; and that she would have  
5 her legs spread apart, raised up in the air, and he would take  
6 a picture of her unclothed vagina.

7                   **THE COURT:** Okay. But I think maybe you're not  
8 understanding my point here.

9                   The point is not that she identifies herself as the person  
10 that's depicted but that that fits within the def -- there is  
11 this rigor that has to be applied to these elements, and one is  
12 that something is child pornography as defined by 2256; right?

13                   **MS. HEPBURN:** Yes.

14                   **THE COURT:** And I don't know that it's appropriate for  
15 a plaintiff herself to make that determination.

16                   **MS. HEPBURN:** We're not purporting to have her make --  
17 I think that's a legal determination, Your Honor, as to whether  
18 the facts put before the Court satisfy the definition of 2256.

19                   Our position is that a closeup shot of the unclothed  
20 vagina of a child on a bed with her legs up in the air is a  
21 lascivious display of a child's genitals, and we believe that  
22 fits the definition. We weren't intending to have Amy make  
23 that assertion to the Court.

24                   **THE COURT:** Okay. So you've got -- so if Amy doesn't  
25 make the assertion to the Court, who does?

1                   **MS. HEPBURN:** I think that's a conclusion, Your Honor.  
2 Amy puts the facts before the Court, and plaintiffs say these  
3 facts add up to a lascivious display of the genitals. And so  
4 as a matter of law, that falls within the definition of Section  
5 2256. And there -- where we ask the Court to make that -- to  
6 agree with us and to say yes, that the display of -- a closeup  
7 of a naked child's vagina is a lascivious display of the  
8 genitals.

9                   **THE COURT:** Why on some of these, then -- why the  
10 inconsistency throughout? On some of them you have the police  
11 officers, the points of contact; some of them you have  
12 Mr. Laws; some of them you have, like I said, the plaintiffs  
13 themselves; and on some of them, you're relying upon the Court.  
14 I don't quite understand -- if you think that all that has to  
15 be established -- that there does not have to be an expert  
16 opinion that they do amount to -- I think that's what you're  
17 saying, that no expert is necessary to establish that they do  
18 amount to child pornography.

19                   **MS. HEPBURN:** It's kind of that old saying we all  
20 heard in law school, "I know it when I see it," when it, you  
21 know, applies to obscenity, Your Honor. And the reason that we  
22 don't have, for instance, a POC for each and every plaintiff  
23 is, frankly, there is difficulties in getting to and getting a  
24 declaration out of those law enforcement agents who are  
25 currently employed by the federal government.

1       I know defense will say, "Well, just send them a *Toohey*  
2 letter and that will suffice." Well, frankly, I have done that  
3 in the past and languished over two years having sent my *Toohey*  
4 letter and being politely persistent in trying to get to an  
5 agent who is currently working.

6       In those circumstances where we were lucky enough to be  
7 able to contact a retired agent who remembered the images or  
8 who was still serving as a secondary or, in the case of the  
9 Lighthouse series, he stepped in upon the -- excuse me -- Agent  
10 Rothrock -- retired Agent Rothrock stepped in when Agent  
11 Beyers was injured in a terrible accident, they're still  
12 serving and so --

13           **THE COURT:** Yeah. I don't want to get into that.

14           **MS. HEPBURN:** So there are different circumstances for  
15 each of the plaintiffs, Your Honor, and that's why we couldn't  
16 marshal the proof identically for each plaintiff.

17           **THE COURT:** Okay. I'm just sort of at a loss as to  
18 how you have an expert with regard to some of these identifying  
19 the information as child pornography, and presumably that would  
20 be presented if I weren't persuaded by it -- indeed, I have my  
21 own opinion as to which ones qualify and which ones don't, but  
22 I don't understand how it is that -- first of all, I'm not  
23 going to use my opinion as to whether or not they meet or don't  
24 meet as long as you're relying upon experts.

25           If, indeed, all you were doing were putting these images

1 before the trier-of-fact -- and, like I said, I thought  
2 everybody had seen them and that I was going to have to figure  
3 out which one -- because there are objections as to the nature  
4 of the images to some of them, and actually Shawn Halbert's  
5 letter points out a number of ones that she didn't believe were  
6 child pornography.

7       But if you're relying upon experts and points of contact,  
8 then it's not obviously up to the Court to determine if they  
9 are or if they are not. It's up to the experts. But let me  
10 get to that. I have lots of questions about the experts.

11       Did the -- how does this work?

12       Mr. Balogh, I'm going to return to you on this. Do you  
13 have a designated expert who will opine that the images are not  
14 child pornography?

15       **MR. BALOGH:** I have not designated any rebuttal expert  
16 at this time.

17       **THE COURT:** Okay. So on a motion for summary  
18 judgment, though, if I accept -- let's take one of the Laws's  
19 ones because that is more -- it's easier.

20       If Mr. Laws designates something as child pornography and  
21 you object to it, well, what evidence do you have if you, one,  
22 haven't seen it, and, two, don't have an expert yourself that  
23 says it's not child pornography -- how do you object to it and  
24 how does that overcome summary judgment?

25       **MR. BALOGH:** Respectfully, I think the question is

1        backwards. My objections have been to the sufficiency of their  
2        showing, and our objection is it's insufficient. I don't  
3        have --

4           **THE COURT:** So --

5           **MR. BALOGH:** I don't have to overcome it. If they  
6        have sufficient evidence, I'm going to -- if they have  
7        sufficient evidence under the Rules of Evidence of Civil  
8        Procedure that proves their case, I lose.

9           **THE COURT:** Right.

10        Let's assume that Mr. Laws has identified one as  
11        pornographic and I've seen it and I agree that it's  
12        pornographic --

13           **MR. BALOGH:** I'm fine with that.

14           **THE COURT:** -- and you object that it's not  
15        pornographic.

16           **MR. BALOGH:** Well, I -- well, I don't think -- I  
17        don't -- I would -- actually, we have a chart and we have  
18        objections to it, so if we can actually go to an actual case,  
19        because I don't think that objection exists except for Sally  
20        and Violet. We do on Sally or Violet, but I don't think I have  
21        raised that specific objection.

22        Erika and Tori the objection is the mother couldn't  
23        identify which one is the other so they can't prove by a  
24        preponderance it's either one of them because the birth mother  
25        says --

1                   **THE COURT:** Hold on. Are you saying then that there  
2 are only two that you object to?

3                   **MR. BALOGH:** No. I objected to everything, but I  
4 objected on different grounds to different showings.

5                   **THE COURT:** On different grounds.

6                   On this ground. I'm still concentrating on this ground,  
7 the pornographic nature of it. That's one of the elements.  
8 I'm doing my best to try to separate the elements so that I can  
9 deal with them one at a time.

10                  **MR. BALOGH:** And my objection is to -- except for two  
11 of them were to the sufficiency of the showing of pornographic  
12 content, not disputing it. And there is -- I'm saying they  
13 haven't put forth -- they have not put forth evidence that  
14 meets the statutory definition, and they suffer a failure of  
15 proof. That's the objection for most --

16                  **THE COURT:** Is your objection more to the third  
17 element, that they haven't established the possession by your  
18 client as opposed to the pornographic nature of the image?

19                  **MR. BALOGH:** It's not -- I wouldn't say "more" to any.  
20 I have made specific objections to each plaintiff, and I'm  
21 resting on every objection I've raised to each plaintiff.

22                  **THE COURT:** Let's look at Sally.

23                  **MR. BALOGH:** Let's look at Sally.

24                  **THE COURT:** I believe that you objected to Sally,  
25 Violet and Erika and Tori on identification by --

1 non-identification by parents, and Sally and Violet I thought  
2 that you objected to both of those as to the content of the  
3 image.

4 **MR. BALOGH:** That was one of the objections I raised  
5 to both of those plaintiffs, yes.

6 **THE COURT:** That's the objection I'm dealing with now,  
7 not all of the other objections you've raised. Let's deal with  
8 one at a time.

9 **MR. BALOGH:** Okay.

10 **THE COURT:** All right. Now, with regard to Sally and  
11 Violet --

12 **MR. BALOGH:** Right.

13 **THE COURT:** -- Mr. Laws, actually on both, says he  
14 identifies the content of both of those images as pornographic.

15 **MR. BALOGH:** That is correct.

16 **THE COURT:** Okay. You've objected to the content.

17 **MR. BALOGH:** That is correct.

18 **THE COURT:** Okay. Do you have an expert that -- and  
19 let's assume I agree with -- let's assume I agree with his  
20 characterization of Sally and Violet as being pornographic  
21 images.

22 **MR. BALOGH:** Let's stay with Sally for now. Let's do  
23 one at a time.

24 Sally -- I say that picture that they presented in  
25 unredacted format, even assuming it's Sally and even assuming

1 it's on his computer, isn't child pornography under 2256. That  
2 no fact-finder could lead to that conclusion. And, thus, I  
3 contend they failed to prove their case with respect to that  
4 one image of Sally, assuming the other predicates have been  
5 met, which I have also disputed.

6 **THE COURT:** Okay. Okay.

7 Sally is a tough one for you all, plaintiffs, given that I  
8 believe that you describe her as a voyeur --

9 **MS. HEPBURN:** Yes.

10 **THE COURT:** -- watching her sister.

11 **MS. HEPBURN:** Yes.

12 And I think that counsel is thinking of a different image  
13 of Sally, which is a nude full frontal shot of her standing and  
14 smiling at the camera, but we identified in our chart the one  
15 where Sally is a voyeur, yes, Your Honor.

16 **MR. BALOGH:** And the problem with that, Your Honor --  
17 I want to make sure this objection was clear -- the one they're  
18 discussing now wasn't disclosed during expert discovery. The  
19 full frontal bathtub shot we discussed at deposition. That was  
20 the basis for the opinion. Now that I've attacked that, they  
21 are all of a sudden at the chart stage substituting a different  
22 image that's not part of their expert disclosures that's  
23 Exhibit D -- their expert disclosures were attached. They are  
24 in the Court's possession. Expert indeed to my opposition  
25 filing on January 29. So they are substituting.

1           So Laws came forward and said the full frontal bath  
2 shots -- he says that is pornographic. We discussed at  
3 deposition. That's what they brought summary judgment on. We  
4 opposed saying that doesn't meet the definition.

5           In the chart for the first time, they're substituting a  
6 new image that's not part of his expert disclosures and not  
7 part of his declaration, and it cannot be considered for an  
8 independent reason because they did not make that an opinion  
9 they were putting forward when they were obligated to disclose  
10 their expert reports by the expert discovery cutoff, so they  
11 can't even rely on that photograph at this stage because it's a  
12 flimflam now that was never previously disclosed. It shows up  
13 in their chart in this case for the first time, and I object  
14 for that independent reason.

15           **THE COURT:** They weren't supposed to put anything in  
16 the chart that wasn't already in the record. Are you telling  
17 me that this wasn't already in the record?

18           **MR. BALOGH:** There was descriptions of photographs  
19 with Sierra in the record because she -- they are supposedly  
20 sisters, but in neither Laws's expert -- neither his  
21 declaration nor his expert disclosures does the voyeur theory  
22 or the voyeur image -- it doesn't exist in this case until now.  
23 And I didn't get notice of that at the expert discovery stage.  
24 It wasn't litigated in the motion. It's a new image they're  
25 claiming meets the definition after briefing is closed, after

1 discovery is closed. It's an independent objection.

2 **THE COURT:** Okay.

3 Ms. Hepburn, where did this come from?

4 **MS. HEPBURN:** He is simply wrong. If you look at our  
5 initial filing on this motion, Declaration of John Doe, who is  
6 the father of Sally, the image attached there that he  
7 identifies as Sally is not the bathtub picture. It is the one  
8 where she is the voyeur looking at Sierra masturbating the  
9 adult male.

10 We are not relying on the declaration of Kevin Laws with  
11 regard to Sally. And, again, I believe that this is a question  
12 of we put the facts before the Court and the Court can decide  
13 whether this constitutes child pornography or not.

14 And, yes, I agree with you, this particular one with the  
15 voyeur -- with Sally as a voyeur, that's not as clear as the  
16 other ones.

17 **MR. BALOGH:** Just for clarity, Your Honor, page 9 of  
18 their chart, they rely on John Doe to identify Sally as a  
19 victim. They identify Laws as the witness to identify sexual  
20 conduct. This is their chart, page 9.

21 So they can't change that. They wrote it in paper. And  
22 it -- and so now they've now admitted they're not relying on  
23 Laws, which was the basis of the Court's question:

24 "Mr. Balogh, if I agree with Mr. Laws, what do you say then?"  
25 But Mr. Laws doesn't say that. He talks about the full frontal

1 picture that they disclose as part of expert discovery, not  
2 this new voyeur theory. And the voyeur theory they're only  
3 identifying that's a picture of Sally, not sexual conduct  
4 because their chart says that. Their chart says they are  
5 relying on Laws.

6 **MS. HEPBURN:** The Laws's reference in the chart links  
7 it to Mr. Curtis. That is the purpose for the reference to  
8 Mr. Laws's declaration.

9 **THE COURT:** Yeah. The third column is the nexus  
10 column.

11 **MR. BALOGH:** Right. But I'm talking about the second  
12 column which is the sexual content column. They're not relying  
13 on John Doe. They are relying on Mr. Laws, which they just  
14 disclaimed on the record.

15 **THE COURT:** Well, they are relying on John Doe for the  
16 identification of her.

17 **MR. BALOGH:** Right. But that's not what we are  
18 talking about. We are talking about the sexual content of the  
19 photo column. That's column 2.

20 **THE COURT:** That's column 2, right.

21 **MR. BALOGH:** Uh-huh. And that's not Doe, that's Laws.

22 **THE COURT:** That's true. That's exactly what it says.

23 **MS. HEPBURN:** But that is the reference to Sierra's  
24 behavior in the photo of which Sally is the voyeur. That is  
25 the purpose for that.

1                   **THE COURT:** The same photo I think appears for Sierra,  
2 and it -- yeah. I'm sure it's the same one -- yeah. Same file  
3 name. It's "sexual content of image is described by Laws."

4                   **MS. HEPBURN:** The photo with Sally in it, Your Honor,  
5 is slightly different than that for Sierra. The scope of the  
6 photo, the frame within which the behavior is shown, is  
7 expanded to include Sally on the image that we reference for  
8 Sally. It did not -- it was not the same as for Sierra,  
9 although it looks to be the same scene happening at the same  
10 time.

11                   **THE COURT:** Okay.

12                   **MR. BALOGH:** My only question with that, Your Honor,  
13 is they identified as the identical image -- the supposed  
14 hashtag value is the same for both, as the Court correctly  
15 noted: 270x330\_F28718AE8410B289B47B.jpg for JPEG is the  
16 identical image in both so I don't understand how there can be  
17 these expanded images or expanded views. It's either the  
18 identical image by the hashtag value or it's a different image,  
19 and the plaintiffs in one breath say it's the identical image  
20 because they named the image name and they say verbally they're  
21 different images because one has an expanded view. I  
22 respectfully contend both those contentions cannot be true.  
23 It's one or the other. They're identical by hashtag value or  
24 they're different images, and the --

25                   **THE COURT:** Okay.

1           Now, let me just make sure I understand. You've got four  
2 different sources identifying what is and what is not child  
3 pornography. Okay. What if the Court determines that an image  
4 is not child pornography?

5           I assume, Mr. Balogh, even though you object to the Court  
6 reviewing any of these photos, if the Court were to determine  
7 that something wasn't child pornography, is it your position  
8 that notwithstanding that, if any aspect of the case has to be  
9 tried, then the Court would have to allow a jury to make that  
10 decision, even though on a Rule 50 motion for a directed  
11 verdict I could certainly determine that the jury got it wrong?

12           **MR. BALOGH:** Well, I think that -- unless you are  
13 going to tell the jury "I talked to the agent in my chambers  
14 and these were found on his computer because I have been given  
15 assurances by the agent," which I would obviously object to --  
16 in the absence of that, the plaintiffs have to prove their case  
17 to the jury.

18           **THE COURT:** First of all, I didn't talk to the agent  
19 in my chambers. I received a thumb drive, and I looked at them  
20 myself. I don't need any help looking at --

21           **MR. BALOGH:** Right. "So I received a thumb drive that  
22 was represented to me to contain what was on his computer, and  
23 I accept those ex parte representations." It's six and one  
24 half dozen to another. I have --

25           **THE COURT:** Okay. I don't want to hear any more about

1 that, and I'm losing my patience, and we still have a lot to  
2 get through. So I just want you to answer the question that  
3 I'm putting to you.

4 **MR. BALOGH:** Okay.

5 **THE COURT:** If I determine that an image is not child  
6 pornography, if I have made that determination based upon my  
7 in camera review, am I supposed to, under your theory of the  
8 case, deny summary judgment and allow it to go to a jury, and  
9 if the jury finds it is summary judgment, I'm supposed to just  
10 let that stand, even if I don't find myself that it amounts to  
11 child pornography?

12 **MR. BALOGH:** I don't think I can answer that  
13 question.

14 **THE COURT:** Yeah. I didn't -- I guess that doesn't  
15 surprise me.

16 Okay. So let me make sure I understand. There are not  
17 going to be experts from both sides telling the jury its view  
18 on whether or not this is child pornography or not?

19 **MR. BALOGH:** They disclosed an expert; we didn't.

20 **THE COURT:** Okay. Okay.

21 Now, there are numerous images in the docket and only one  
22 appears on the chart. I'm assuming that the plaintiffs  
23 selected one per person. I didn't actually mean for you to  
24 limit it, but I know I said "one," but I meant one as the  
25 floor. You have to pick at least one per person as opposed to

1 everyone. So there are a lot more in the record than have been  
2 identified on the chart.

3 If the Court were to find that there was an image per --  
4 for one of the plaintiffs that did not amount to child  
5 pornography, is it the plaintiffs' position that you would  
6 still be able at trial to present any of the other images that  
7 are currently in the record?

8 **MS. HEPBURN:** Yes, Your Honor. We did understand from  
9 the Court that the Court wanted us to select only one per  
10 plaintiff for purposes of making things more manageable, and so  
11 that's what we did.

12 **THE COURT:** I understand. One of my law clerks told  
13 me that that is what he understood, too. That's not what I  
14 meant, but okay. I stand by that.

15 So your chart does not preclude you from making -- or  
16 using other exhibits. The limitation is they have to already  
17 be part of the record. They cannot be something beyond what  
18 you've already produced in this case. That's the only  
19 limitation.

20 **MS. HEPBURN:** Yes.

21 **THE COURT:** So in that instance, if the matter were to  
22 proceed to trial, both the charted images as well as other  
23 images would be presented; is that correct?

24 **MS. HEPBURN:** Yes, Your Honor.

25 **THE COURT:** You wouldn't just present the one that you

1       picked for the chart --

2           **MS. HEPBURN:** True.

3           **THE COURT:** -- when you've got so many. Okay. Okay.

4           All right. Let's turn to one of the other issues, and  
5        that is the third column, the possession by the defendant on  
6        his computer.

7           Now, in the chart, you say -- I asked you to put down  
8        everything that you were relying upon to show the defendant's  
9        possession of each of these items -- of each of the images, at  
10       least the images that are on the chart. You indicate for all  
11       defendants you're relying upon the plea agreement, the  
12       transcript of the plea hearing, and the HSI report. Then of  
13       course as you go through each image, you add additional  
14       sources.

15       Now, I spent some time this morning looking at those --  
16       all of these items, and I don't see anywhere in the plea  
17       agreement or the transcript of the plea hearing or the HSI  
18       report anything specific about the images found on the  
19       defendant's computer, only references to child pornography  
20       generally found on his computer. The HSI report, which looks  
21       to me to be just one page with the NCMEC report attached to it  
22       or at least following it on Docket 139-4 -- there are details  
23       about the airport stop, the seizure of the devices and the  
24       media and the forthcoming forensic examination, but there isn't  
25       anything specifically that identifies the images that you all

1 have put forward as having been found on the defendant's  
2 computer.

3 Ms. Halbert's letter also makes it clear there aren't any  
4 admissions by the defendant as to any particular images. I  
5 also note in her letter it's not clear to me even which images  
6 are being discussed and whether or not they're the same images  
7 we're talking about today. And she also objects that not all  
8 the images are pornographic in nature.

9 So I'm not seeing anything in those -- the Halbert letter,  
10 the HSI report, the plea agreement, or the transcript that tie  
11 these images specifically to Mr. Curtis's computer. So that  
12 leaves the NCMEC report, the Coffren declaration, and the Laws  
13 declaration.

14 **MS. HEPBURN:** Your Honor, if I may, the references  
15 generally to "all plaintiffs" refer to the recitation in those  
16 documents of the USB drives described as the SanDisk Cruzar,  
17 the Transcend, etc., those particular items of media which were  
18 seized. They were referenced in the plea agreement, I believe.  
19 And so that is a more generic reference.

20 And then when we get to Mr. Laws's declaration, then he  
21 refers to finding specific images on each of those pieces of  
22 media; again, the SanDisk Cruzar, the Transcend drive, etc.  
23 And those are also listed on the HSI report, Your Honor, the  
24 single-page HSI report. That was the intent of those  
25 references.

1                   **THE COURT:** And was Mr. Laws -- how do we know that he  
2 was looking at the same drives that were seized?

3                   **MS. HEPBURN:** Well, it was the drive that was provided  
4 to him in the 3509 procedure by Agent Popper, which was the  
5 same one that was listed on the report, acknowledging their --  
6 Mr. Balogh's objection that that's an element of hearsay, but  
7 we think that we overcome that as well.

8                   **THE COURT:** How?

9                   **MS. HEPBURN:** First -- well, I would rely primarily,  
10 Your Honor, on the residual hearsay rule, Federal Rule of  
11 Evidence 807, which talks about the indicia of reliability  
12 surrounding the statement and corroborating evidence, and in  
13 that regard, there's several indicia of reliability. And,  
14 again, it's a -- there's 15 different plaintiffs, and so you  
15 have to look multiple places. But one is this was a statutory  
16 procedure that Mr. Laws was involved in, sanctioned by statute,  
17 which was also preceded by a specific protocol meeting at  
18 Homeland Security in -- around Washington, D.C. That then --  
19 this process proceeded on that.

20                   We have the NCMEC report which lists the file name of the  
21 individual images. Mr. Laws did find in a number of  
22 circumstances the file name of the individual images. The  
23 images, sanitized images, that supervising agent Barfuss  
24 provided similarly had the same file names in multiple  
25 instances.

1           And then Ms. Halbert's letter and AUSA Garcia's letter  
2 also provide descriptions, which are similar, very similar in  
3 some circumstances -- in other circumstances for other images,  
4 not so much -- that also are the same for a number of these  
5 images. So you have a corroboration of the whole by all of  
6 these different factual instances which do correlate with each  
7 other.

8           **THE COURT:** So for 15 plaintiffs, you expect me to go  
9 through this puzzle and figure out where the trail is?

10           **MS. HEPBURN:** Well, that's why we provided the chart,  
11 Your Honor, and we do think that that's a shorter path to  
12 resolution in the case than trial, which consumes more judicial  
13 resources.

14           **THE COURT:** Okay. I'm not sure I even understand  
15 exactly how you think all of that shows.

16           Mr. Balogh, you made an objection -- I think you repeated  
17 it for each one of your people -- that the -- essentially the  
18 plaintiffs are relying upon the hearsay of Agent Popper and  
19 Barfuss. They are the two that provide images, I guess, the  
20 devices or a thumb drive or whatever, to Mr. Laws for his two  
21 views of the evidence. And you indicate that those aren't even  
22 the images representing the plaintiffs' child  
23 exploitation series -- you say that they're the images  
24 reflecting the series and not the actual images found on the  
25 defendant's computer. Please explain what you mean.

1                   **MR. BALOGH:** Okay. I will take it a couple steps.

2                   One, let's start with Popper, and the reason 807 doesn't  
3 apply is, one, it's just plain hearsay. It's just "Popper told  
4 us that he was giving us," and I think plaintiffs are wrong.  
5 If you look at Laws's declaration and his deposition, what Laws  
6 says is he doesn't look at what the -- at the actual drives.  
7 That what he claims is that Popper made him a different drive  
8 and Popper told him everything on that drive was seized. So  
9 that's the nature of the hearsay.

10                  And 80 -- one, we don't think that would meet 807.1  
11 because we don't think relying on an agent, which is  
12 testimonial hearsay and core confrontation, has indicia of  
13 reliability.

14                  But even if they could overcome that burden, they have to  
15 show they couldn't get it from another source through  
16 reasonable efforts, and they most certainly could have  
17 subpoenaed Laws, Popper, or Barfuss for deposition under Rule  
18 30 and secured testimony for this case.

19                  So they had a reasonable opportunity to get it. They  
20 forewent it, and this is a shortcut, so I don't think 807 gets  
21 them home.

22                  But back to your question specifically, so for number one,  
23 it's the original images. It relies on the hearsay of "Popper  
24 made me a special drive, and I looked at that drive, and I'm  
25 relying on Popper's representations."

1           For Barfuss, that's -- after he couldn't find all the  
2 images, if you look at what Laws says -- Laws doesn't say that  
3 Barfuss even represented that these are sanitized versions of  
4 what was found on Mr. Curtis's media. There isn't even the  
5 equivalence for number one. He is saying "She -- she sent me  
6 sanitized images from the series, and they link up to some file  
7 names," meaning they don't link up to other file names, which  
8 means they're not exact copies. And Laws never says that even  
9 Barfuss represented to him "I'm sending you in sanitized  
10 version all of the images found on Curtis's media." She says,  
11 "I'm sending you sanitized versions of the photographs of these  
12 plaintiffs," and that's apples and oranges.

13           So, for example, if we just take Erika and Tori, they say  
14 they are relying on MAM8XEC. That name doesn't come up in  
15 Laws's expert disclosures. It doesn't come up in Laws's expert  
16 report. It doesn't come up in Laws's declaration in support of  
17 summary judgment. It shows up on the chart. Where does it  
18 come from? And they say in the -- and they finally say in  
19 column 3, "well, that image is on the NCMEC report."

20           Where is the evidence that that image was found on it  
21 except -- on his computer and where is the evidence that that  
22 image is the equivalent of the one they're describing in sexual  
23 content? There is no evidence in the record to find any of it.  
24 And I know it's been hard on Your Honor. Believe me, I hope at  
25 least my work shows I've dug through everything extraordinarily

1 closely. The first time I heard of MAM8XEC being in this case  
2 was when I got their chart, and I went through all their  
3 citations, and it doesn't mention it. There is no evidence  
4 that -- except for the NCMEC report, there is no evidence that  
5 that resided on Curtis's media, and there is no evidence that  
6 that image has sexual content because they just describe images  
7 they say were found on his thing without linking what they say  
8 they see to the file name. So there is a double disconnect.

9 So I'm saying that none of that -- they can't get over any  
10 of that hearsay. 807 -- and they have now admitted it's  
11 hearsay -- 807 doesn't mean you can repeat what a police  
12 officer tells you, and that's the basis for the opinion. And  
13 I'll go one step further, had Laws -- theoretically Laws could  
14 have opined why he was relying on it and what he did, why did  
15 he look for a chain of custody form, how has indicia of  
16 reliability -- laws, who is a former HSI agent, could have at  
17 least undertaken to make a reliability showing or show what  
18 these images were, make a list of the file names. Laws  
19 presented none of that. And at this stage, that evidence is  
20 just absent from the record. And because it's absent from the  
21 record, they haven't sustained their burden for any plaintiff  
22 that these images that they say are child pornography resided  
23 on Mr. Curtis's media, and in the absence of that showing, they  
24 cannot have summary judgment.

25 **THE COURT:** Ms. Hepburn?

1                   **MS. HEPBURN:** We did provide that particular image,  
2 the Pink Heart Sisters image with Mr. Laws's expert disclosure.  
3 It is on the declaration as well. So it's not the first time  
4 that Mr. Balogh has known of it.

5                   We acknowledge there is an issue with the identification  
6 there in terms of the mother not knowing which of the girls it  
7 is. That's true. But it's -- like so many things Mr. Balogh  
8 says we're just producing it at this time is simply not true.  
9 We did produce it with the expert disclosure. He did have it  
10 before. It is not one that Mr. Laws found in his evidence  
11 review, and he didn't make it up that he found it. And so --  
12 but it was provided to him by Agent Barfuss in response to her  
13 request for Curtis sanitized images.

14                   **MR. BALOGH:** I guess we're talking past each other.

15                   Here is my simple question: Where in the record does it  
16 say that file name MAM8XEC.jpg is the same image as the image  
17 they claim it is? Which witness identifies that file name as a  
18 pornographic image found on his machine? That's my question.

19                   I'm unaware of any witness saying that on any occasion,  
20 but I'll stand to be corrected or I'll sit to be corrected  
21 because we're on Zoom. That's what I don't understand. And  
22 that's true for many of them, but that's the example we'll lead  
23 with. Where does that file name show up before the chart in  
24 this case ever?

25                   **THE COURT:** What does the -- to throw something else

1 in the mix, what does the NCMEC report get you? How far does  
2 that get you to the possession on the defendant's computer?

3 **MS. HEPBURN:** It correlates the file name with those  
4 images that were produced, Your Honor. It's another indicia of  
5 corroboration of reliability.

6 **THE COURT:** It correlates the file name with the  
7 images that were produced by whom?

8 **MS. HEPBURN:** Produced with the expert disclosure,  
9 Your Honor, and as are detailed in the declarations, some --  
10 not all of the declarations but some of the declarations  
11 supporting the summary judgment motion, those are -- we do give  
12 file names in a number of those declarations.

13 **THE COURT:** Walk me through this report. I'm not sure  
14 I understand it. Tell me about this report. The Coffren  
15 declaration doesn't really give me a lot of detail.

16 So who sends these images to this non-profit organization?

17 **MS. HEPBURN:** The case agent makes a clone of the  
18 actual media seized from the defendant. The clone goes to  
19 NCMEC, N-C-M-E-C. Their case analysts look at it. They look  
20 for known images of child pornography, that is, images that  
21 have been identified to a particular series or a particular  
22 individual. And then a report is then sent back to the law  
23 enforcement agent on the case.

24 We've found 38 images of the Vicki series. Here is the  
25 file names. As are listed, they're separated out by series in

1 the report as is shown.

2                   **THE COURT:** But it doesn't really prove that the  
3 images that it lists were found on Mr. Curtis's computer. I  
4 mean, that proof has to come from whoever did the forensic  
5 examination of his computer, doesn't it?

6                   **MS. HEPBURN:** A case agent, yes, Your Honor.

7                   **THE COURT:** Okay. Is that Popper?

8                   **MS. HEPBURN:** Yes, it is Popper. He was part of the  
9 law enforcement team on the original case against Mr. Curtis,  
10 and I believe that he was the person designated as the case  
11 agent.

12                  **THE COURT:** And Barfuss as well?

13                  **MS. HEPBURN:** I'm sorry?

14                  **THE COURT:** Barfuss, which is -- is with HSI as well,  
15 but what is her position, his or her position?

16                  **MS. HEPBURN:** Popper's?

17                  **THE COURT:** Barfuss.

18                  **MS. HEPBURN:** Barfuss. She's a supervisor of Agent  
19 Popper.

20                  **MR. BALOGH:** Just to be clear, I'm not sure it's a  
21 hundred percent correct. An agent by the name of Jerry  
22 Kawai -- I understand no relation to my colleague John Kawai --  
23 was the lead case agent. Popper came on the case later, as I  
24 understand it, and I do agree that Barfuss, as I understand her  
25 position, has been represented to be a supervising agent

1 currently at HSI on Samson Street -- 630 Battery Street,  
2 San Francisco.

3 **THE COURT:** Laws says that he was -- in his  
4 declaration that he was provided images from both of them, from  
5 both Popper and Barfuss. He reviewed some of the materials at  
6 HSI that were provided by Popper on July 14 of 2020, and then  
7 he indicates that he received from Barfuss on October 12th,  
8 2020, some additional images, but he doesn't say how he  
9 received them.

10 **MS. HEPBURN:** He received them via email, Your Honor.

11 **THE COURT:** Pardon me?

12 **MS. HEPBURN:** He received them via email, although it  
13 may not be in the declaration. I can't speak to that  
14 specifically at the moment.

15 **THE COURT:** It doesn't say how he received them or in  
16 what form. This -- yeah. I think there are some problems.  
17 There are definitely some problems in this case.

18 The absence of having a description, a declaration from  
19 someone connected with the forensic examination of the  
20 computer -- I mean, even if this a preponderance of the  
21 evidence and even if circumstantial evidence is admissible on  
22 these questions, there is simply nothing connecting  
23 Mr. Curtis's computer with these images other than Popper and  
24 Barfuss said they were; right? But neither one of them has  
25 submitted a declaration or been -- have they been deposed? I

1 have no idea.

2                   **MS. HEPBURN:** No, they have not been deposed,  
3 Your Honor.

4                   **THE COURT:** They have not been deposed. They haven't  
5 submitted a declaration. Okay. That's an issue and obviously  
6 some of the identification issues. I don't quite understand  
7 why you -- are there no other pictures from Erika and Tori? I  
8 don't know how you could possibly find, notwithstanding the  
9 fact that the image is pornographic, in the Court's view, and  
10 has been described as that by Mr.-- no. No one has described  
11 it, actually. No one has described the image of Erika and Tori  
12 as pornographic. You say in your chart you're relying on the  
13 Court's review of it.

14                   **MS. HEPBURN:** Your Honor, we simply couldn't -- we  
15 couldn't possess the image so we couldn't describe it, and we  
16 couldn't reach the POC for that particular series.

17                   **THE COURT:** Yeah. There are a couple of problems with  
18 this showing. The fact that there are so many different  
19 sources. The fact that there are -- there's an expert for some  
20 of the images who identifies them as pornographic. For some of  
21 them there are the points of contact, and those are probably  
22 sufficient, I guess. Assuming the officers know what the  
23 statute -- how the statute defines it, it's probably sufficient  
24 for a police officer to define something as child pornography.

25                   I'm not persuaded that the children themselves, that the

1       victims themselves, are appropriate. They can certainly  
2       describe the nature of the image, but they can't come to the  
3       legal -- they can't opine on whether or not it meets 2256, so  
4       that would be the fact-finder.

5           And then on some of these, you are relying on the Court,  
6       even though you don't even know what my view is on all of  
7       these, and I have to tell you, it was not unanimous that -- in  
8       my view, that all of these qualified.

9           **MR. BALOGH:** Can I make one objection to that, one  
10       thing in the mix?

11           **THE COURT:** What?

12           **MR. BALOGH:** On the POCs, I won't restate prior  
13       objections obviously because you told me not to, but for the  
14       police officers, expert reports were due on November 30th.  
15       They didn't provide expert reports for the POCs, so under  
16       Rule 26 they can't rely on expert opinion for them, so I would  
17       respectfully contend the Court can't rely on them as experts,  
18       as police officer experts, because the plaintiffs did not  
19       provide expert reports saying "We will offer expert testimony  
20       from this officer, and the opinion the officer will render is  
21       X, Y or Z." And I don't think it's a good objection saying  
22       they're POCs because they did ultimately give declarations from  
23       the people they are relying on like Rothrock or Findley. So  
24       why couldn't they -- they should have been required under this  
25       Court's scheduling order to give me a report on November 30th

1 that said "We are going to rely on the expert opinion of Thomas  
2 Rothrock, and he is going to say X. We are going to rely on  
3 the expert testimony of Joshua Findley, and he is going to say  
4 Y." We didn't get that notice, and the absence of giving  
5 expert reports precludes reliance on expert testimony at the  
6 summary judgment stage.

7 **THE COURT:** Yeah. I'm just not sure it's being  
8 offered as expert testimony, though, for a police officer, that  
9 you have to qualify a police officer as an expert to give an  
10 opinion on that.

11 **MR. KAWAI:** And I believe the written report  
12 requirement is for retained witnesses.

13 **MR. BALOGH:** I respectfully --

14 **THE COURT:** The written report requirement is for  
15 retained experts. Right. It's kind of like what happens in  
16 civil litigation when doctors -- when the treating physician,  
17 who doesn't provide an expert report and is not called as an  
18 expert but is being called by virtue of their expertise gained  
19 in their treatment of this particular person -- we don't  
20 require expert reports.

21 **MR. BALOGH:** But in criminal cases where a police  
22 officer testifies as a fact witness and an expert, reports are  
23 required, disclosures required, and *Daubert* vetting required.

24 **THE COURT:** But this isn't a criminal case,  
25 Mr. Balogh. This is a civil case.

1           So I don't think that that is fatal, but my whole point is  
2 I'm very uncomfortable with the notion that for some of these,  
3 obviously you feel that you have the need to have an expert or  
4 a lay opinion provide the conclusion that these fit within the  
5 definition, and on some of them, you're relying on the  
6 plaintiffs themselves, which is troublesome for me. And on  
7 some of them, you are relying on the Court, even though you  
8 don't even know what my construction is. And that makes me  
9 feel like you're substituting the Court for the proof that you  
10 would otherwise need to -- if I had not done an in camera  
11 review, you would have to put on some evidence that it  
12 qualifies.

13           I don't understand why the Court's in camera review, now  
14 that I have had a chance to look at all this stuff, now that I  
15 understand that you all haven't seen the images, etc. -- I  
16 don't think that that should substitute for some other indicia  
17 or some other conclusion. Either I decide all of them based  
18 upon my review or I rely upon the opinions of others as you  
19 have put forward with regard to the majority of them.

20           **MS. HEPBURN:** Your Honor, if I may, let me be really  
21 clear here. We are not in any case relying on an opinion of a  
22 plaintiff themselves that the image is in fact pornographic.  
23 It is not our intent to have any plaintiff put forth such an  
24 opinion.

25           The plaintiffs' statements were "this image was taken

1       while I was being abused." That is not the equivalent of  
2       saying this is a pornographic image under Section 2256.

3       A lot of our perhaps -- the different approaches to this  
4       is we were trying to put forth for the Court the best evidence  
5       we had having no template, as Your Honor started this hearing  
6       with, having no roadmap necessarily about proof that is  
7       acceptable to a Court under 2255. And so we were trying to put  
8       forth what we had for the Court.

9       We do believe that the POC declarations are again factual  
10      and not expert and that we put forth the facts about here's the  
11      image, here's what's in the image as best we know, and we  
12      submit that that satisfies 2255.

13       If I could have the image and attach it unredacted to a  
14      declaration and I could therefore then put in my brief "and  
15      such and such declaration shows and the attachment shows this  
16      is what's in the picture and we submit it," then we wouldn't  
17      have to ask the Court to have an in camera review. We're  
18      hamstrung by the fact this is contraband, and we were trying to  
19      work around those constrictions as best we could.

20                   **MR. BALOGH:** May I respond, Your Honor?

21                   **THE COURT:** Yes.

22                   **MR. BALOGH:** Two points. One, for Amy for sexual  
23      content column, they only rely on Amy's declaration. For Erika  
24      and Tori in the sexual content column, they only rely on  
25      Ms. Halbert's confidential settlement letter and no other

1 declaration, no declaration at least for sexual conduct. No.  
2 3, Jenny, again, they rely on Jenny, the plaintiff, for sexual  
3 content.

4 So to the extent that -- Ms. Hepburn just said they're not  
5 relying on any plaintiff to establish sexual content, then  
6 those are all withdrawn because that's exactly what the chart  
7 says.

8 And I have to, again, just disagree with this hamstrung  
9 theory. They could have deposed Popper and they could have had  
10 Laws testify to everything they wished that he did now. They  
11 could have had him make all those representations subject to  
12 cross-examination at deposition. They didn't do that. And now  
13 they have a failure to prove. But I don't think they are  
14 hamstrung. They made or executed poor choices, and that is not  
15 being hamstrung. That is just the quality of the litigation.

16 **THE COURT:** Ms. Hepburn, you were trying to speak?

17 **MS. HEPBURN:** Yes. What I said about the plaintiffs'  
18 declarations was we put facts there. We did not intend to put  
19 an opinion and have a plaintiff say "and this equals child  
20 pornography under 2256." I think those are two very different  
21 things.

22 **THE COURT:** But you did intend for me to interpret the  
23 Laws's declaration as identifying child pornography; correct?

24 **MS. HEPBURN:** Yes. In those circumstances in which --

25 **THE COURT:** That's in the same column. Why wouldn't I

1 come to that conclusion that that's how you are proffering it?

2 The column heading is "sexual content."

3 **MS. HEPBURN:** It may be in the same column, but the  
4 nature of what is referred to is not necessarily the same,  
5 Your Honor.

6 **THE COURT:** I know. But to the extent that you're  
7 trying to make this easy and clear for me, you've totally  
8 confused me. If you put in that column that you are relying  
9 upon Laws, his determination, as to sexual content -- because I  
10 told you before -- before you did this, I told you that one of  
11 the elements is that it has to not just be sexual content, but  
12 it has to be pornographic.

13 **MS. HEPBURN:** Well, Mr. Laws describes what he saw in  
14 the image, and so that is putting facts before the Court as to  
15 what is contained in the image.

16 **THE COURT:** Okay. Okay. All right. And it's up to  
17 the trier-of-fact to determine if it's pornographic or not?

18 **MS. HEPBURN:** Yes.

19 **THE COURT:** Okay. All right. I think that I pretty  
20 much had enough. Is there -- hold on one second. I just  
21 dropped all my papers. Hold on. I will be back with you in a  
22 few minutes.

23 (Pause in proceedings.)

24 **THE COURT:** I just looked through my papers, and I  
25 don't have anything else. I think I've run out of patience.

1 And so unless any of you have something that you think I  
2 absolutely need to know, I'm going to take the matter under  
3 submission and see what I'm going to do with it.

4 **MR. BALOGH:** Thank you for your time, Your Honor.

5 Appreciate it.

6 **MR. KAWAI:** Thank you, Your Honor.

7 **MS. HEPBURN:** Thank you, Your Honor.

8 **THE COURT:** All right.

9 (Proceedings adjourned at 2:42 p.m.)

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3 CERTIFICATE OF REPORTER

4 I certify that the foregoing is a correct transcript  
5 from the record of proceedings in the above-entitled matter.

6

7 DATE: Wednesday, March 31, 2021

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9 *Pamela Batalo Hebel*

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Pamela Batalo Hebel, CSR No. 3593, RMR, FCRR  
U.S. Court Reporter

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